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IN THE
Supreme Court of the United States

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN, JR., ATTORNEY GENERAL,
Cross-Petitioner,

v.

CORAL POWER, L.L.C., ET AL.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

JEFFREY D. WATKISS
BRACEWELL & GIULIANI LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006-1872
(202) 828-5800
Counsel for Coral Power, L.L.C.

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951
Counsel for Powerex Corp.

May 16, 2007

(additional counsel listed on inside cover)

BEST AVAILABLE COPY

ROBERT H. LOEFFLER
KATHERINE C. ZEITLIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-1500
Counsel for AES Placerita, Inc.

DONALD A. KAPLAN
JOHN LONGSTRETH
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 628-1700
Counsel for PPL EnergyPlus, LLC and PPL Montana, LLC

JOHN T. STOUGH, JR.
KEVIN M. DOWNEY
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for Public Service Company of New Mexico

GARY D. BACHMAN
HOWARD E. SHAPIRO
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800
Counsel for Puget Sound Energy, Inc.

MARGARET A. MOORE
HOWARD E. SHAPIRO
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800
Counsel for Sempra Energy Trading Corp.

STEVEN C. NELSON
DANIEL A. KING
SEMPRA ENERGY
101 Ash Street HQ13D
San Diego, California 92101
(619) 699-5136
Counsel for Sempra Generation and Sempra Energy Solutions LLC

QUESTION PRESENTED

Whether the Court should review the court of appeals' holding, which conflicts with no decision of any circuit or this Court, that the Federal Energy Regulatory Commission has complied with the Federal Power Act in authorizing the sale of wholesale electricity at market prices.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, cross-respondents Coral Power, L.L.C., AES Placerita, Inc., Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation state the following:

Coral Power, L.L.C. is owned by Coral Energy Holding, L.P., which is indirectly owned by Shell Oil Company. Shell Oil Company is owned by Royal Dutch Petroleum Company, which in turn is owned by Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

AES Placerita, Inc. is a wholly owned subsidiary of The AES Corporation. AES Placerita, Inc. has its principal offices in Newhall, California. The AES Corporation is a publicly traded Delaware corporation with its principal executive offices located in Arlington, Virginia. The AES Corporation has no parent company, but approximately 16% of its stock is owned by Legg Mason Capital Management, Inc. ("LMCM"). LMCM is not a publicly traded company, but it is wholly owned by Legg Mason Inc. ("LMI"), which is a publicly traded company. LMI has no parent company, and no publicly held company owns 10% or more of its stock.

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

PPL EnergyPlus, LLC and **PPL Montana, LLC** are wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. PPL Corporation has no parent company, and no other publicly held company

has a 10% or greater ownership interest in PPL Energy-Plus, LLC, PPL Montana, LLC, or PPL Corporation.

Public Service Company of New Mexico ("PNM") is a corporation organized and existing under the laws of the State of New Mexico, and is engaged primarily in the generation, transmission, distribution, and sale of electricity and in the transmission, distribution, and sale of natural gas within the State of New Mexico. PNM is a wholly owned subsidiary of PNM Resources, Inc. ("PNM Resources"), which is a corporation organized and existing under the laws of the State of New Mexico. PNM Resources is a publicly traded company and has issued securities to the public. Other than PNM Resources, PNM has one affiliate, Texas-New Mexico Power Company, that has issued shares or debt securities to the public.

Puget Sound Energy, Inc. is an electric and natural gas utility with its principal office in Bellevue, Washington. Its parent company is Puget Energy, Inc. Puget Energy, Inc. owns 100% of Puget Sound Energy, Inc.'s common stock. Puget Energy, Inc. has no parent corporations and is not aware of any publicly held company that owns 10% or more of its outstanding stock.

Sempra Energy Solutions LLC and **Sempra Generation**: Both Sempra Energy Solutions LLC ("SES") and Sempra Generation are indirect wholly owned subsidiaries of Sempra Energy, a publicly held corporation. No other publicly held company has a 10% or greater ownership interest in each of Sempra Generation, SES, or Sempra Energy. Sempra Generation acquires, develops, and operates power plants and energy infrastructure, and markets at wholesale the output from power plants, for the competitive market. SES is a retail provider of natural gas and electricity to commercial and industrial customers throughout the United States in markets that offer retail choice.

Sempra Energy Trading Corp. ("SET") is a corporation organized and existing under the laws of the State of Delaware. Its principal office is located at 58 Commerce Road, Stamford, Connecticut 06902. SET is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric energy and power, natural gas, crude oil, base metals, and associated commodities. SET is a wholly owned indirect subsidiary of Sempra Energy, whose shares are publicly traded. No other publicly held company has a 10% or greater ownership interest in SET or Sempra Energy.

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INTRODUCTION

Coral Power, L.L.C. and other parties to the proceedings below (collectively, "petitioners") have sought this Court's review of a narrow but important question on which the circuits are in conflict: whether the Federal Energy Regulatory Commission ("FERC" or "the Commission") has authority to order retroactive refunds when the carefully limited provisions in §§ 205(e) and 206(a) of the Federal Power Act ("FPA") do not apply. In finding that FERC does have that power, the Ninth Circuit awarded California essentially all of the relief that it sought in its petition for review of FERC's order – that is, an opportunity to pursue retroactive refunds from those participants in California's wholesale electricity markets that it has not already pressed into settlements.

Not content with that sweeping (and unprecedented) victory, California has filed this conditional cross-petition, which presents a frontal assault on the Commission's longstanding practice of approving market-based rate tariffs. But *no court* has accepted California's contention that the Commission has violated the FPA in approving tariffs that permit prices for wholesale electricity to be set in the market. Instead, *every court* to have opined on the issue has reached the same conclusion as the court of appeals in this case – FERC's market-based rate regime comports with the FPA. *See Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C. Cir. 1993); *see also Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). That unanimity is not surprising given the widespread acceptance of market-based rates around the country. Indeed, there is no small irony in California's Attorney General now arguing to invalidate the Commission's market-based rate tariffs, because in the mid-1990s the California legislature restructured the State's electric power industry based on the existence of markets for trading wholesale electricity under those tariffs, and it has not abandoned that structure. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 835 (9th Cir.) (describing California's "aggressive market

experiment"), *amended on other grounds on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

Because the court of appeals correctly rejected California's challenge to the Commission's approval of market-based rate tariffs and that holding conflicts with no decision of this Court or another court of appeals, certiorari is unwarranted and the cross-petition should be denied. The Court regularly denies cross-petitions that do not independently warrant certiorari in cases in which it grants the main petition,[1] and there is no reason for a different result here.

STATEMENT OF THE CASE

The legal, factual, and procedural background of this case is discussed at length in the petition in No. 06-888 (at 3-16). While we do not repeat that detail here, we briefly describe the FPA, the Commission's market-based rate regime, and pertinent procedural history.

The FPA. The FPA requires that "[a]ll rates . . . made, demanded, or received" by sellers of wholesale electricity be "just and reasonable" and not unduly discriminatory. FPA § 205(a)-(b), 16 U.S.C. § 824d(a)-(b). Sellers must file, "[u]nder such rules and regulations as the Commission may prescribe" and "within such time and in such form as the Commission may designate," "schedules" showing rates for sales of wholesale electricity. FPA § 205(c), *id.* § 824d(c). Sellers also must provide FERC with notice of any proposed change in a filed rate. *See* FPA § 205(d), *id.* § 824d(d). The Commission has discretion to investigate the lawfulness of a proposed rate change, to suspend the effectiveness of the proposed rate

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[1] *E.g.*, *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 191 n.10 (1999); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 n.2 (1998); *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 711 n.10 (1998); *see NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (cross-petition presenting a question of fact not meriting the Court's review was improvidently granted).

pending administrative review, and – when the proposed rate takes effect after a period of suspension but before the conclusion of FERC's investigation – to order refunds for sales occurring during the period of review. *See* FPA § 205(e), *id.* § 824d(e). *See generally City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.) (under § 205, FERC plays a "reactive role").

FERC also has authority to initiate a hearing – on complaint or on its own motion – to investigate whether a new or existing rate is unjust, unreasonable, or unduly discriminatory. *See* FPA § 206(a), 16 U.S.C. § 824e(a). If FERC finds that it is, the Commission must take prospective action, such as determining a "just and reasonable rate . . . to be thereafter observed and in force." *Id.* In addition to setting a rate "to be thereafter observed," FERC has discretion to order a seller to refund the difference between the existing rate and the rate that FERC determines is just and reasonable. *See* FPA § 206(b), *id.* § 824e(b). But FERC's refund authority is confined to sales that occurred *after* the statutory "refund effective date," which at the time at issue in this case could be no earlier than 60 days after either the filing of the complaint or the publication of the Commission's decision to initiate an investigation. *See* 16 U.S.C. § 824e(b) (2000); *see also* Pet. App. 53a ("section 206 bars retroactive refund liability").[2]

Market-Based Rate Tariffs. FERC allows utilities to sell wholesale power at the market price – that is, in transactions between willing buyers and sellers. The Commission's market-based rate regime developed over time, as reduced barriers to entry in the market for generation of electricity and nondiscriminatory access to transmission lines combined to facilitate effective competition in the market for wholesale electricity. *See generally New York v. FERC*, 535 U.S. 1, 7-12 (2002); The Electric Energy Market Competition Task Force, *Report to*

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[2] Citations to "Pet. App." refer to the petition appendix in No. 06-888.

Congress on Competition in Wholesale and Retail Markets for Electric Energy 19-25 (Apr. 2007) ("*Competition Report*"), *available at* http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act/epact-final-rpt.pdf. FERC continues to refine and improve that regime. *See* Order Dismissing Complaints, *CAlifornians for Renewable Energy, Inc.*, 119 FERC ¶ 61,058, at ¶¶ 31-40 (2007) (describing numerous improvements that the Commission has made to its market-based rate regime since 2001).

Before authorizing a seller to make any sales under a market-based rate tariff, the Commission requires the seller to "establish that it, and its affiliates, either do not have, or have adequately mitigated, market power." *Grand Council of Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000); *see Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 176 (D.C. Cir. 1994) (per curiam). That requirement is the key to the Commission's market-based rate regime. As courts have recognized, FERC's determination that a seller lacks market power – a determination that must be made before the seller is authorized to conduct transactions at the market rate – establishes that the forces of supply and demand in a properly regulated market will assure that the seller's rates are just, reasonable, and not unduly discriminatory, as required by § 205(a) and (b). *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) ("Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)'s just-and-reasonable-rate] requirement."); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable").[3]

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[3] *See also, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) ("Commission is not required to adhere rigidly to a cost-based determination of rates, much less to one that base[s] each producer's rates on his own costs"; "courts are without authority to set aside any rate adopted by the Commission which is within a zone of reason-

The Commission continues to examine and to refine its market-power analysis. *See* Notice of Proposed Rulemaking, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 71 Fed. Reg. 33,102 (2006) (proposing to amend the Commission's regulations to codify and to refine the standards for granting market-based rate authority).

Under FERC's market-based rate regime, a potential seller files an application to transact at market-based rates. In the case of an applicant that has an existing rate schedule on file with the Commission, the application notifies FERC of the seller's intent to change its rate from a cost-based rate to a market-based rate, as required by § 205(d). The Commission notifies the public of the seller's application and accepts public comments on it. When FERC approves a seller's application, it issues an order, of which aggrieved parties can obtain judicial review. *See, e.g., Louisiana Energy & Power Auth.*, 141 F.3d at 366-69.

As part of a seller's application, the seller tenders for filing a proposed rate schedule "authorizing it to sell power at market-based rates." *Grand Council of Crees*, 198 F.3d at 953. Once FERC decides that the seller lacks market power (and meets the Commission's other requirements), the Commission "accept[s] for filing, without suspension or hearing, [the seller's] application . . . to transact . . . at market-based rates." *British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at 62,136 (1997). The seller's rate schedule is placed on file with FERC, as required by § 205(c). *See Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (market-based rate tariff "'preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so'") (quoting Pet. App. 43a),

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ableness") (alteration in original; internal quotation marks omitted); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963) ("[i]t has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates").

cert. denied, 125 S. Ct. 2957 (2005); *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 FERC ¶ 61,184, at 61,972 (2003) ("market-based rate authorizations satisfy the FPA Section 205(c) requirement that rates be on file with the Commission"). Because FERC does not authorize a seller to transact at market-based rates until after it has completed its administrative review, § 205(e)'s provision for refunds on sales occurring during the review period does not apply.[4]

During the period at issue in this petition, FERC's orders granting authority to sell at market-based rates generally required sellers to submit periodic reports on their market power and their transactions in the market. Quarterly transaction reports included, among other things, information on participants in the transactions, the type of power sold, and the price at which that power was sold. *See Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,778 (1989); *see also* 18 C.F.R. § 35.10b (reporting regulation adopted after events at issue here). The Commission also required sellers either to inform it of any changes implicating their ability to exercise market power or to file a new analysis of their market power every three years. *See, e.g., GPU Advanced Resources, Inc.*, 80 FERC ¶ 61,255, at 61,928 (1997); 18 C.F.R. § 35.27(c) (reporting regulation adopted after events at

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[4] The Commission *could* make a utility's market rate effective subject to refund under § 205(e), but it instead chooses to authorize sales at that rate only after it has completed its investigation of the justness and reasonableness of that proposed rate. *See* Pet. App. 41a ("In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power."). (Although the § 205(e) procedure is unnecessary under the Commission's market-based rate regime, the Commission's orders approving market-based rate applications sometimes grant requests to waive FERC's notice requirement, making a seller's market-based rate schedule effective after its application is filed but before the date of the order approving the application. *See, e.g., British Columbia Power Exchange*, 80 FERC ¶ 61,343, at 62,141.)

issue here; requires timely reporting of "any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority").

FERC uses that reported information to monitor the seller's ability to exercise market power and to decide whether to open an investigation under FPA § 206. *See Chicago Energy Exchange of Chicago, Inc.*, 51 FERC ¶ 61,054, at 61,112-13 (1990) (requiring "quarterly informational filings" "to monitor for potential market power problems"); *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,778 (requiring "informational filings . . . to monitor [the seller's] ability to exercise market power"); p. 3, *supra*. If FERC finds that the seller has gained market power, then FERC can order prospective modifications to the seller's tariff (including revoking the seller's market-based rate authority, as it did in the case of Enron[5]), and it can require a seller to pay refunds, subject to the limitations of FPA § 206. *See* Pet. App. 44a-45a.

Procedural History. In March 2002, California filed with FERC a complaint against sellers of wholesale electricity in California during 2000 and 2001. As relevant here, California argued that the market-based rate tariffs under which those sellers operated during that time period were unlawful under the FPA because they did not permit FERC to determine, before each transaction occurred, whether the actual market price at the time was just and reasonable. California sought an order requiring sellers to refund the difference between prices for those sales and prices that FERC determines would have been just and reasonable.

FERC rejected California's challenge to the legality of its market-based rate system. The Commission explained that "[t]he prerequisite for approval of market-based rates is a finding that the seller lacks or has mitigated its mar-

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[5] *E.g.*, Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004).

ket power in the relevant market" and that, "[s]o long as a seller lacks market power and thus buyers have alternatives, market-based rates will meet the just and reasonable standard." Pet. App. 39a; *see id.* at 41a-43a. It reasoned that market-based rate tariffs satisfy § 205(c)'s filing requirement because "the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so." *Id.* at 43a; *see id.* at 45a-46a & n.40, 53a. FERC further explained that the quarterly transaction reports provided "an efficient and adequate means for the Commission and the public to examine on a continuing basis whether a seller and its affiliates lack market power" and to identify "pricing trends, discriminatory patterns, or other indicia of the exercise of market power." *Id.* at 42a; *see id.* at 43a-44a; *see also id.* at 48a (transaction reports do not "establish the market rate," but "are an important tool in assuring that a seller's use of market-based rates remains reasonable").

California petitioned for rehearing, which FERC denied. The Commission reaffirmed that its market-based rate regime comports with the FPA. *See id.* at 68a-69a & n.12.

California petitioned for review in the Ninth Circuit under FPA § 313(b), 16 U.S.C. § 825*l*(b). The court of appeals upheld FERC's authorization of market-based rate tariffs, concluding that those tariffs do not violate the FPA because FERC determines that the seller lacks market power and requires the seller to report on its transactions. *See* Pet. App. 9a-11a.

After the time for filing a certiorari petition had run but within the time for filing a conditional cross-petition under this Court's Rule 12.5, California filed a conditional cross-petition. Under this Court's rules, a conditional cross-petition "will not be granted unless another party's timely petition for a writ of certiorari is granted." Sup. Ct. R. 13.4. Thus, if the petition in No. 06-888 is not granted, then this cross-petition must be denied as well.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Although the Court should grant the petition in No. 06-888, it should deny California's conditional cross-petition for four complementary reasons. *First*, no decision of a court of appeals or of this Court conflicts with the Ninth Circuit's holding that the Commission's market-based rate regime comports with the FPA. On the contrary, courts have uniformly rejected similar challenges. *See Elizabethtown Gas*, 10 F.3d at 870-71; *see also Town of Norwood*, 202 F.3d at 419. Thus, there is no conflict that might warrant certiorari. *See* Sup. Ct. R. 10(a), (c).

Second, the court of appeals correctly concluded that FERC's market-based rate system does not violate the FPA, and Congress ratified that system when it enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Multiple provisions of that Act would make no sense if, as California claims, Congress has prohibited the Commission from approving market-based rate tariffs.

Third, contrary to California's claims, resolving the question presented in the principal petition does not require addressing the question presented in the cross-petition. The petition requires resolution only of an important, but far narrower, question: whether the Ninth Circuit disregarded Congress's considered decision to deny FERC a power to order retroactive refunds for unjust and unreasonable charges in every case. The Court can resolve that straightforward question of statutory interpretation without deciding whether market-based rate tariffs satisfy FPA § 205(c).

Fourth, prohibiting the Commission from approving market-based rate tariffs would undermine the Nation's short-term wholesale electricity markets, to consumers' detriment.

A. No Court Has Questioned The Legality Of The Commission's Market-Based Rate Regime

1. California claims that the court of appeals' holding that the Commission's approval of market-based rate

tariffs comports with the FPA conflicts with two of this Court's decisions involving other industries, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994). That is incorrect. Both of those cases involved fundamentally different agency actions and statutory schemes.

In *Maislin*, the Court struck down an Interstate Commerce Commission ("ICC") policy that prevented common carriers from recovering from shippers the filed rate, when the parties had privately negotiated a lower rate that was not on file with the ICC. *See* 497 U.S. at 130-32. The Court held that the ICC's policy of enforcing unfiled, privately negotiated rates over filed rates "undermines the basic structure of the [Interstate Commerce Act ("ICA")]," *id.* at 132, which "forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate," *id.* at 130. Thus, the problem in *Maislin* was not that the rates were set by the parties' negotiation – it was that those rates differed from the rate on file with the agency. Here, by contrast, sellers charge only the rates set forth in their rate schedules – that is, the market rate – and they do so pursuant to a FERC regulatory regime that ensures the absence of market power that could be abused in the kind of secret transactions at issue in *Maislin*.

In *MCI*, the Court invalidated the Federal Communications Commission's ("FCC") "permissive detariffing" policy, under which the FCC exempted "non-dominant" carriers from the tariff-filing requirement of the Communications Act of 1934. 512 U.S. at 221. As in *Maislin*, the agency's policy eliminated "the heart of the common-carrier section of the Communications Act" – the tariff-filing requirement, *id.* at 229 – and therefore could not be justified by the FCC's statutory authority to "modify" the statute's requirements. *See id.* at 229-32.

In contrast to the FCC in *MCI*, FERC has not eliminated the FPA's filing requirement. Under FERC's

market-based rate regime, electricity sellers must file and abide by market-based rate tariffs. And, before accepting those tariffs, the Commission ensures that the applying sellers lack market power. Further, after sellers obtain authority to sell at market-based rates, they must comply with a host of regulatory requirements – including reporting on their market power and information about their market transactions (including prices). *See* 18 C.F.R. §§ 35.10b, 35.27(c). Far from having "deregulate[d] the [wholesale power] industry," *MCI*, 512 U.S. at 220, FERC exercises substantial regulatory oversight. *See* Pet. App. 10a-11a.[6]

Furthermore, unlike the statutes at issue in *Maislin* and *MCI*, the "heart" of the FPA is the integrity of privately negotiated contracts, not the tariff-filing requirement.[7] Congress enacted the ICA, which it has since repealed, at a time when non-uniformity of price was the rule among common carriers. The "great purpose" of the ICA was "to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, . . . to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and

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[6] California wrongly suggests (at 7 n.4) that the Commission's market-based regime conflicts with *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994). The *Kmart* Court held that the tariff in that case was not on file by operation of an ICC regulation, which invalidated a carrier's tariff if that tariff referenced another tariff in which the carrier no longer participated. *See id.* at 436. Unlike the ICC in *Kmart*, however, FERC has held that sellers' market-based rate tariffs are valid, *see, e.g.*, Pet. App. 53a, and no Commission regulation suggests anything to the contrary. Nor does *Whitaker v. Frito-Lay, Inc. (In re Olympia Holding Corp.)*, 88 F.3d 952 (11th Cir. 1996), pose a conflict; the court held that the tariffs in that case *did* "comply with the ICA's requirement that carriers file their 'rates.'" *Id.* at 961.

[7] *See, e.g., Boston Edison Co. v. FERC*, 856 F.2d 361, 370 (1st Cir. 1988) ("[A] salient purpose of the Federal Power Act was to preserve the 'integrity of contracts, . . . [thereby permitting] the stability of supply arrangements.'") (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956)) (second and third alterations in original).

forbidding rebates, preferences and all other forms of undue discrimination." *New York, N.H. & H.R.R. Co. v. ICC*, 200 U.S. 361, 391 (1906). The ICA "in effect *precludes private rate agreements* by its requirement that the rates to all shippers be uniform." *Mobile*, 350 U.S. at 338 (emphasis added); *see id.* at 345. Similarly, under the Communications Act, "[t]he requirements . . . that common carriers file their rates with the [FCC] and charge only the filed rate were the centerpiece of the Act's regulatory scheme." *MCI*, 512 U.S. at 220.

While the ICA may have been "the model for" the FPA and the Natural Gas Act ("NGA"), *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 478 n.3 (2002), the FPA and the NGA erected fundamentally distinct regulatory regimes. In those statutes, "Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Id.* at 479.[8] Congress did so because it recognized that, "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who [can] be expected to negotiate a 'just and reasonable' rate as between the two of them." *Id.*; *see Mobile*, 350 U.S. at 345 (NGA "recognizes the need for private contracts of varying terms"); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) (*Mobile*'s interpretation of the NGA applies equally to the FPA).[9] The FPA and the NGA therefore "expressly recognize[] that rates to particular customers may be set by individ-

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[8] *See Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 73-74 (D.C. Cir. 1992) ("*unlike the Federal Power Act*, the Interstate Commerce Act also explicitly provides that a 'carrier may not charge or receive a different compensation . . . than the rate specified in the tariff'") (quoting the ICA) (alteration in original; emphasis added).

[9] *Cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) (recognizing that, in passing the FPA, Congress "apparently" concluded that wholesale buyers of electric energy were adequately protected without a general provision for retroactive refunds of unreasonable charges).

ual contracts," *Mobile*, 350 U.S. at 338, and that the Commission's role is largely supervisory, *see id.* at 341-43. Under those statutes, "all rates are established initially by the [utilities], by contract or otherwise," and the Commission's "basic power" is "to review rates and contracts made in the first instance by [utilities] and, if they are determined to be" unjust, unreasonable, or discriminatory, "to set [them] aside and modify" them. *Id.* at 341.[10]

2. California also asserts (at 5-6) that the decision below conflicts with *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) (Scalia, J.), and *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (Scalia, J.) ("*RCCC*"), but neither is on point.

First, *Electrical District* and its progeny[11] did not adopt the interpretation of § 205(c) that California urges here. Instead, those cases involved "what it means to 'fix' a rate within the meaning of" § 206 of the FPA, a different provision of the Act that allows FERC to modify rates that have become unjust and unreasonable. 774 F.2d at 492. In *Electrical District*, the D.C. Circuit held that the Commission had not "fixed" a rate under § 206 merely by issuing an order prescribing the principles governing the determination of the rate. *See id.* at 492-93. The principal defect in the FERC practice at issue in *Electrical District* was that the Commission attempted to make a rate effec-

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[10] *See Mobile*, 350 U.S. at 343 ("[T]he Act presumes a capacity in [utilities] to make rates and contracts and to change them from time to time . . . . The obvious implication is that, except as specifically limited by the Act, the rate-making powers of [utilities] were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.").

[11] *See Public Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201, 1223, 1225 (10th Cir. 1987) (applying *Electrical District*); *see also Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (quoting from *Electrical District* in explaining "the rationale for prohibiting retroactive increases in filed rates").

tive *before* the utility had filed the rate schedule. *See id.* at 491; *Public Serv. Co. of New Mexico*, 832 F.2d at 1223 & n.22; *see also Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990) ("In *Electrical District* the Commission sought to make a rate effective under [§ 206] as of the date it *ordered* the [utility] to make a compliance filing rather than the date on which the Commission *accepted* the compliance filing."). That defect is not present in FERC's market-based rate system because utilities are not authorized to transact at market-based rates before their market-based rate schedules have been accepted for filing.

Moreover, the D.C. Circuit has clarified that it does not require that a rate schedule specify a "numerical rate." *Electrical District*, 774 F.2d at 492.[12] In *Transwestern Pipeline*, the court explained that the Commission "need not confine rates to specific, absolute numbers"; rather, FERC "may approve a tariff containing a rate 'formula' or a rate 'rule.'" 897 F.2d at 578. But FERC may not "simply announce some formula and *later* reveal that the formula was to govern from the date of announcement (as it had done in *Electrical District*)." *Id.* Thus, "where the

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[12] California's current insistence that the FPA prohibits a tariff that does not contain a numerical price conflicts with its representation in its complaint that it "does not contend that market-based pricing per se violates the FPA." Compl. at 13. California there stated that the Commission "may institute a system where rates are determined by negotiation between buyers and sellers, so long as rates do not exceed a cap lawfully established by FERC." *Id. But see Competition Report* at 5 (price caps can "limit legitimate scarcity pricing and impede incentives to build generation in the face of scarcity"); *id.* at 80 (price caps may "deter suppliers from making needed investments in new capacity" and "limit[] recovery of legitimate costs and delivery of adequate returns"). If, as California now claims, negotiated rates do "not pass muster," Cross-Pet. 6, it is difficult to see how the market-based system it proposed in its complaint could satisfy its view of the statute. In any event, if this Court were inclined to consider the legality of FERC's market-based rate regime, it should wait for a case in which the petitioner definitively seeks a return to fixed, cost-based rates and is not a State whose electric energy industry depends on the existence of market-based rate tariffs and that seeks refunds and rate caps.

Commission explicitly adopts a formula and indicates when it will take effect, courts may not (without invading the Commission's province) say that such a formula may never qualify as a 'rate' within the meaning of" § 205. *Id.* (citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).[13]

Second, *RCCC* is likewise inapposite. There, the court held that the ICC violated the ICA when it allowed freight forwarders to charge unpublished rates; neither the buyer nor the public could ascertain how those rates were determined or whether they were determined in the same manner for all buyers. *See* 793 F.2d at 378-79.[14] The same cannot be said of market-based rate tariffs because competitors and customers alike know that prices will be set by the market. *See, e.g.*, Pet. App. 43a ("[T]he on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so.").

Furthermore, *RCCC* involved the ICA, which – by insisting on uniformity – absolutely forbade private rate agreements. *See Mobile*, 350 U.S. at 338. In contrast, the FPA encourages private contracts. *See Verizon*, 535 U.S. at 479. And the Commission engages in extensive market regulation (by ensuring that sellers lack market power before they enter the market and that they do not later

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[13] The court also noted that *Columbia Gas* was not controlling insofar as it relied on *Electrical District* in "suggest[ing] that a rate violates the filed rate doctrine simply because a customer cannot respond in some way that enables it to escape the charge" (such as by passing it on to a customer down the distribution chain). *Transwestern Pipeline*, 897 F.2d at 579.

[14] Notably, and in contrast to the FPA administered by FERC, the ICA, before it was repealed in large part in 1995, specified that "[a] rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission . . . shall be stated in money of the United States." 49 U.S.C. § 10762(a)(2) (1994).

gain such power) to ensure that the prices in those contracts are just and reasonable.

In sum, California's claims of conflicts cannot obscure the plain fact that no court has questioned the legality of FERC's market-based rate regime.

B. Congress Has Removed Any Doubt About The Legality Of FERC's Market-Based Rate Regime

As the Commission explains in its brief in opposition (at 18-20), FERC's market-based rate regime satisfies all of the FPA's requirements, and the court of appeals therefore correctly rejected California's challenge to the legality of that regime. In addition, even if there had been any doubt about the Commission's authority to approve market-based rate tariffs, Congress eliminated that doubt when it enacted the Energy Policy Act of 2005 ("EPA").[15]

That Act contains multiple provisions that make sense only if the Commission's market-based rate regime is valid. Most notably, Congress established a special remedial provision for sales of wholesale electricity prior to June 20, 2001, if the Commission "revoked the seller's authority to sell any electricity *at market-based rates*." EPA § 1290(a)(2), 119 Stat. 983-84 (emphasis added). That provision plainly targets sellers (such as Enron) that lose their market-based rate authority through punitive action by the Commission. *See* Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004). The provision would make no sense if the Commission is required to revoke *all* sellers' market-based rate tariffs because those tariffs conflict with FPA § 205. Instead, that provision confirms the Commission's authority to approve market-based rate tariffs under the FPA.

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[15] The Commission has recognized Congress's ratification of its market-based rate regime. *See* Brief for Respondent FERC at 47-50, *Colorado Office of Consumer Counsel v. FERC*, No. 04-1238 (D.C. Cir. filed Jan. 9, 2007).

Congress also adopted a prohibition on "Market Manipulation" that is essentially based on fraud and scienter in, among other things, market-based transactions. Congress made it "unlawful for any entity . . . to use or employ, in connection with the purchase or sale of electric energy . . . , any manipulative or deceptive device or contrivance." EPA § 1283, 119 Stat. 979. That provision similarly confirms the legitimacy of FERC's market-based rate regime because a prohibition on market manipulation presumes the existence of rates set in a market.

Other provisions of the Act are to the same effect. Congress adopted a new provision ("Electricity Market Transparency Rules") that directs FERC to take actions to "facilitate price transparency in *markets* for the sale and transmission of electric energy." *Id.* § 1281, 119 Stat. 978 (emphasis added). And Congress provided the Commission with new enforcement authority over entities that make "short-term sale[s] of electric energy through an *organized market* in which the rates for the sale[s] are established by Commission-approved tariff." *Id.* § 1286, 119 Stat. 981 (emphasis added).

When Congress is fully aware of an agency's regulatory regime and legislates "against the background" of "repeated[] and consistent[]" agency action, its legislation may "effectively ratif[y]" the agency's regime. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). The Commission has been approving market-based rate tariffs for more than a decade, and Congress has been well aware of that practice.[16] Thus,

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[16] *See, e.g., California Energy Markets – Refunds and Reform: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 108th Cong. 41 (2003) (testimony of FERC Chairman that, "since 1992, people have come in and asked for and in most cases been granted the authority to sell power at market-based rates, i.e., what the market will bear"), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.120&filename=87231.pdf&directory=/diskb/wais/data/108_house hearings; *Joseph T. Kelliher Nomination: Hear-*

when Congress legislated against that background and presumed the validity of market-based rates in the EPA, it "effectively ratified" the Commission's market-based rate regime. *Brown & Williamson*, 529 U.S. at 156; *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-96 (1980) (statutory interpretation "buttressed" by the facts that "the agency has consistently interpreted the Act to permit [certain transactions]" and, "[m]ore importantly," that "Congress seems clearly to have contemplated [those] transactions").

C. Resolution Of The Question Presented In The Petition Does Not Require Consideration Of The Question Presented In The Cross-Petition

Although appearing to acknowledge that its claim does not meet this Court's criteria for granting review, California suggests that the cross-petition should be granted nonetheless because the questions presented in the petition and cross-petition are somehow intertwined. Cross-Pet. 2-4. California claims that the petition is based on an assumption that the filed rate doctrine bars the relief sought by California and that *Maislin* and *MCI* show that that assumption is erroneous. But California misunderstands the dispositive issue presented in the petition. The central error of the Ninth Circuit was not its disregard of the filed rate doctrine; rather, it was the court's conclusion that Congress granted FERC general authority to issue retroactive refunds under FPA § 205.

The difference between the two issues is plain. The filed rate doctrine, which applies "across the spectrum of regulated utilities," "has its origins in this Court's cases interpreting the Interstate Commerce Act." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

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ing Before the S. Comm. on Energy and Natural Resources, 108th Cong. 37 (2003) (Sen. Cantwell, questioning whether Congress should "explicitly prohibit [power] marketers from charging market-based rates"), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.120&filename=85674.pdf&directory=/diskb/wais/data/108_senate_hearings.

Under that Act, the filed rate doctrine did not prohibit the ICC from awarding "reparation[s]" when it found that a filed rate was unjust and unreasonable. *Maislin*, 497 U.S. at 129; *see id.* at 128 ("The filed rate doctrine . . . contains an important caveat: The filed rate is not enforceable if the ICC finds the rate to be unreasonable."). In the FPA, by contrast, "Congress withheld from [FERC] power to grant reparations." *Montana-Dakota Utils.*, 341 U.S. at 254.[17] It did so because "[w]holesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings." *Id.* at 258 (Frankfurter, J., dissenting) (citing 16 U.S.C. §§ 824d(e), 824e(a)).

Deciding the cross-petition's broad challenge to the legitimacy of FERC's market-based rate regime is unnecessary to the resolution of whether the Ninth Circuit violated the FPA's clear limits on FERC's refund authority. To be sure, the Ninth Circuit's holding that FERC has authority to order refunds under § 205 in the circumstances of this case undoubtedly conflicts with decisions that have employed the concept of the filed rate doctrine in explaining FERC's lack of retroactive-refund power. *See* No. 06-888 Pet. 22-23. But the key fact is that Congress intentionally withheld from FERC the power that the Ninth Circuit has now given it. And that is true regardless of whether market-based rate tariffs satisfy FPA § 205(c). Accordingly, because the question presented in the cross-petition is neither independently worthy of certiorari nor integral to the proper resolution of the question presented in the petition, the cross-petition should be denied.

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[17] *Accord FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) ("[T]his Court has repeatedly held that [FERC] has no reparation power."); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944) (FERC "has no power to make reparation orders"); *see* No. 06-888 Pet. 19-21 (explaining the statutory history of FERC's limited power to order refunds for sales of wholesale electricity at unjust-and-unreasonable rates).

D. Prohibiting The Commission From Approving Market-Based Rate Tariffs Would Hurt The National Economy

Invalidating the Commission's market-based rate regime would cause a wide range of harms; here, we focus on one – undermining short-term markets for wholesale electricity. Those markets cannot function without market-based rate tariffs. In organized short-term markets based on a central clearing-price mechanism, all sellers receive the same price for their power, and that price may exceed some sellers' costs, while failing to meet the costs of other sellers.[18] Under the former regime of fixed, cost-based rates, such a market would not have been possible because sellers were prohibited from receiving more or less than the numerical, cost-based rates specified in their tariffs. *See generally* Energy Information Administration, U.S. Dep't of Energy, *The Changing Structure of the Electric Power Industry 2000: An Update* 63 (Oct. 2000) ("Without blanket approval to sell power at market-based rates, these competitive centralized markets could not exist."), *available at* http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update2000.pdf. In addition, individually negotiated short-term transactions that take place outside of organized markets would be impractical if (as California contends) parties were required to file the terms of those transactions with FERC for review before the contracts could be performed. That is because the Commission lacks the resources to review transactions quickly enough to enable the volume of trades necessary to sustain a competitive and liquid market.

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[18] *See, e.g.*, *Competition Report* at 69 & n.189 ("all U.S. exchange markets have a uniform price auction to determine the price of electric power"; "under a 'single price' or uniform price market, all sellers are paid the single market-clearing price"). The so-called "market clearing price," which all sellers receive, is the price for the most expensive unit of supply that is required to meet the demand at that particular time (bids to sell at a higher price are rejected). That pricing method encourages investment in new generation when efficiently produced (and therefore less expensive) energy is scarce. *See id.* at 79-80.

Restricting short-term markets would have adverse consequences on the electric energy industry and consumers of electricity. In particular, because organized spot markets "provide participants with guaranteed physical access to the transmission system," they can "increase competitive options for wholesale customers and suppliers as compared to most bilateral markets." *Competition Report* at 3-4. Further, the "price transparency" in organized markets can "increase the efficiency of the trading process for sellers and buyers and can give clear price signals indicating the best place and time to build new generation." *Id.* at 4. Groups as diverse as the Natural Resources Defense Council, California Wind Energy Association, and Citizens Action Coalition of Indiana have explained to the Commission that they "are convinced that properly structured regional wholesale electricity markets . . . can provide net benefits to customers and promote critical national goals related to fuel diversity, energy security, and environmental protection." Letter from Robert Gramlich, American Wind Energy Association, on behalf of numerous groups to Hon. Joseph T. Kelliher, Chairman, FERC, at 1 (Feb. 26, 2007), *available at* http://www.paenergynews.com/pdfs/letter_kelliher022807.pdf.[19]

Accepting California's challenge to the Commission's market-based rate regime would destroy those economic efficiencies and defeat Congress's policy of promoting competition in wholesale power markets. *See* Brief of Electric Power Supply Ass'n *et al.* at 5-6, No. 06-888 (filed Apr. 25, 2007) ("EPSA Br.") (discussing national policy of competition in wholesale power markets). Ultimately,

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[19] *See* Gordon van Welie, President and Chief Executive Officer of ISO New England Inc., Address to the Federal Energy Regulatory Commission's Conference on Competition in Wholesale Power Markets at 2, Docket No. AD07-7-000 (Feb. 27, 2007) ("Studies evaluating the result of competition fostered by organized electricity markets demonstrate substantial efficiency gains at the wholesale level and considerable progress with respect to investment in needed infrastructure."), *available at* http://www.iso-ne.com/pubs/pubcomm/pres_spchs/2007/ceo_remarks_ferc_conference_022707.pdf.

that loss of competition would harm the Nation's electricity consumers. As a number of noted economists have explained, "[a]mong economists, it is almost universally accepted that well functioning competitive electricity markets yield the greatest benefits to consumers in terms of price, investment and innovation," and "there is growing evidence and convincing studies that show that consumers have saved billions of dollars in energy costs as a result of competitive markets when compared to the traditional regulation in effect before competition was implemented." Open Letter to Policymakers from Paul L. Joskow *et al.* at 1, 2 (June 26, 2006), *available at* http://www.competecoalition.com/economists_letter.pdf; *see also* EPSA Br. 9-10 (discussing gains in consumer welfare produced by competitive wholesale electricity markets).

CONCLUSION

The Court should deny the conditional cross-petition for a writ of certiorari.

Respectfully submitted,

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951
Counsel for Powerex Corp.

JEFFREY D. WATKISS
BRACEWELL & GIULIANI LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006-1872
(202) 828-5800
Counsel for Coral Power, L.L.C.

ROBERT H. LOEFFLER
KATHERINE C. ZEITLIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-1500
Counsel for AES Placerita, Inc.

DONALD A. KAPLAN
JOHN LONGSTRETH
KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 628-1700
Counsel for PPL EnergyPlus, LLC and PPL Montana, LLC

JOHN T. STOUGH, JR.
KEVIN M. DOWNEY
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for Public Service Company of New Mexico

GARY D. BACHMAN
HOWARD E. SHAPIRO
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800
Counsel for Puget Sound Energy, Inc.

MARGARET A. MOORE
HOWARD E. SHAPIRO
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800
Counsel for Sempra Energy Trading Corp.

STEVEN C. NELSON
DANIEL A. KING
SEMPRA ENERGY
101 Ash Street HQ13D
San Diego, California 92101
(619) 699-5136
Counsel for Sempra Generation and Sempra Energy Solutions LLC

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